Supreme Court, U.S.
FILED

97

No. (1) 071412 MAY 12 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRYAN ALLEN,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To The Arizona Court Of Appeals, Division One

PETITION FOR WRIT OF CERTIORARI

DAVID MICHAEL CANTOR, *Counsel of Record*
CARI MICHELE MCCONEGHY-HARRIS
TODD E. NOLAN
THE LAW OFFICES OF DAVID MICHAEL CANTOR, P.C.
2141 East Broadway Road, Suite 220
Tempe, Arizona 85282-1705
(480) 858-0808

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTION PRESENTED

Whether the Fourth Amendment to the United States Constitution mandates suppression of evidence derived from a police officer entering a residential parking lot and removing a cover over a car in order to search for evidence of a crime despite the lack of probable cause or even an individualized suspicion to support the search?

PARTIES

Petitioner is Bryan Allen. Respondent is the State of Arizona.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITON	6
A. Reasons to review the Arizona Court of Appeals' conclusion that Sgt. Butler's removal of the car cover did not constitute a search	7
B. Reasons to review the Arizona Court of Appeals' conclusion that Sgt. Butler's removal of the car cover, if a search, was not unconstitutional	15
CONCLUSION	22

Appendix A: Opinion of the Court of Appeals of the State of Arizona ..... App. 1

Appendix B: Order of Dismissal of the Superior Court of the County of Maricopa, State of Arizona ..... App. 19

Appendix C: Order of the Supreme Court of the State of Arizona denying certiorari ..... App. 22

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412 (1990) 19

Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535 (1973) 8, 16

Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149 (1987) 12, 13, 14

Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886) 22

Camara v. Municipal Ct., 387 U.S. 523, 87 S.Ct. 1727 (1967) 8

Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464 (1974) 5, 11, 12, 14

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925) 8, 16

Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970) 8, 18

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969) 8, 21

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447 (2000) 18

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971) 18

Ex parte Jackson, 96 U.S. 727 (1877) 12

TABLE OF AUTHORITIES – Continued

Page

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983) 8, 21

Illinois v. Andreas, 463 U.S. 765, 103 S.Ct. 3319 (1983) 8, 9, 10

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1976) 8, 9, 12, 18, 21

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972) 19

Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989) 17, 18

New York v. Class, 475 U.S. 106, 106 S.Ct. 960 (1986) ..... *passim*

Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735 (1986) 11

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980) 7, 8

Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431 (1960) 12

Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679 (1961) 22

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) 8, 21

United States v. Knight, 534 U.S. 112, 122 S.Ct. 587 (2001) 17, 19

TABLE OF AUTHORITIES – Continued

Page

FEDERAL CIRCUIT COURT CASES

United States v. $277,000 U.S. Currency, 941 F.2d 898 (9th Cir. 1991) ..... *passim*

United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) 18

United States v. Baker, 221 F.3d 438 (3d Cir. 2000) 18

United States v. Hatley, 15 F.3d 856 (9th Cir. 1994) 16

United States v. Johnson, 256 F.3d 895 (9th Cir. 2001) 16

United States v. Williams, 417 F.3d 373 (3d Cir. 2005) 19

United States v. Ziegler, 474 F.3d 1184 (9th Cir. 2007) 9

STATE COURT CASES

State v. Allen, 216 Ariz. 320, 166 P.3d 111 (App. 2007) 1

State v. Dean, 206 Ariz. 158, 76 P.3d 429 (2003) 7, 8, 21

State v. DeWitt, 184 Ariz. 464, 910 P.2d 9 (1996) 9

State v. Kempton, 166 Ariz. 392, 803 P.2d 113 (App. 1990) 8, 16

State v. Montgomery, 174 P.3d 936 (Kan. App. 2008) 19

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. XIV 2

OPINIONS AND ORDERS BELOW

The Arizona Supreme Court's Order denying review is unpublished, but the Arizona Court of Appeals Opinion reversing the Maricopa County Superior Court's Order of suppression of evidence found during the unconstitutional search is reported and published as *State v. Allen,* 216 Ariz. 320, 166 P.3d 111 (App. 2007).

JURISDICTION

In its published Opinion issued on August 23, 2007, the Arizona Court of Appeals reversed the Superior Court's Order suppressing evidence based on a Fourth Amendment violation. The Arizona Supreme Court denied review of the timely Petition for Review on February 12, 2008. Thus, this Court has jurisdiction over this timely petition for writ of certiorari based on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, places, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath

> or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "Nor shall any state deprive any person of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

On October 22, 2005 at about 12:30 a.m., police responded to an intersection in Tempe, Arizona to investigate a fatal hit and run collision involving a pedestrian. Sgt. Butler arrived at the scene, and commenced his investigation by examining the generic automobile bits of debris left behind (red-colored body parts, paint chips, amber-colored turn indicator lenses, a windshield wiper and other, miscellaneous pieces). A civilian witness informed Butler that he observed a red Mitsubishi 3000 GT speeding in the area immediately prior to losing sight of the vehicle near the intersection and then hearing a loud "thud." About two minutes later, the civilian arrived at the intersection and saw that a pedestrian had been hit. The civilian witness saw neither the collision nor the suspect automobile's license plate. Following the conversation, Sgt. Butler requested the police dispatcher to broadcast an "Attempt to Locate" for a red Mitsubishi 3000 GT, and an air and ground search commenced.

Three hours later, at approximately 3:30 a.m., Sgt. Butler left the scene to search surrounding residential neighborhoods for the suspect vehicle. He checked adjacent apartment complexes first, then continued to check apartments in a northern then in a westbound direction. Several minutes later, Butler entered the east parking lot of an apartment complex located some distance away. He noticed a car covered with a car cover, and with only the bottom twelve to fifteen inch portion of the passenger and driver side doors exposed. Butler could see that there was a seat belt hanging out of the lower portion of the closed passenger door, but, because the car was covered, he could not determine the car's make or model nor whether it was damaged or had been in an accident. Butler did not see any paint chips on the ground near the car or any fluid leaking from it, and he could not even tell if the color of the car matched the shade of the debris left at the accident scene.

Without obtaining a warrant, Butler then lifted the front passenger side of the car cover up and over the light assembly, revealing some damage to the light assembly. He then peeled the cover up over the windshield and found the vehicle had sustained extensive damage to the front passenger side window and roof. Finally, he lifted the rear portion of the cover in order to expose the license plate. Following a motor vehicle department check of the license plate number revealing that Bryan Allen was the car's registered owner and that he lived at the apartment complex, police contacted, questioned and arrested Mr. Allen.

The State filed a direct complaint against Bryan Allen on October 25, 2005, charging him with one count of leaving the scene of a fatal accident, a Class 3 felony. Mr. Allen moved to suppress "all evidence gathered after the Tempe Police Department illegally searched his vehicle" on March 13, 2006, arguing that Sgt. Butler's removal of the car cover constituted an unconstitutional search unsupported by a warrant or probable cause, that Mr. Allen manifested a subjective and objectively reasonable expectation of privacy that Butler unlawfully violated, and that evidence obtained from the search must be suppressed pursuant to the Fourth Amendment and, in particular, the holding in *United States v. $277,000 U.S. Currency*, 941 F.2d 898 (9th Cir. 1991).

At the suppression hearing, Butler conceded that lifting the car cover to examine the vehicle was a random act, unsupported by even a hunch. The State argued, however, that Mr. Allen had no reasonable expectation of privacy meriting Fourth Amendment protections and that Butler's actions did not constitute a search. The State also argued that, even if a search occurred, the intrusion was so *de minimus* that it did not offend the Fourth Amendment.

The Trial Court heard the suppression motion and, following further briefing regarding exigent circumstances and emergency aid exceptions to the warrant requirement, granted the motion to suppress. (App. B.) The Trial Court found that Mr. Allen had subjectively demonstrated an objectively reasonable privacy expectation by covering his car and,

citing *$277,000 U.S. Currency*, that Butler's removal of the covering was a search violating the United States and Arizona Constitutions. (*Id.*) The Trial Court also found that the State conceded that no probable cause supported Butler's search and that neither exigent circumstances nor the emergency aid doctrine justified the warrantless search. (*Id.*) Thereafter, the court granted a dismissal without prejudice and the State appealed.

On August 23, 2007, Division One of the Arizona Court of Appeals issued a published Opinion reversing the trial court's suppression order. (App. A.) The Court of Appeals, relying on *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464 (1974), and *New York v. Class*, 475 U.S. 106, 106 S.Ct. 960 (1986), reasoned that Butler did not perform a search when he lifted the car cover and viewed the exterior of Mr. Allen's car. (App. A., ¶¶ 16-17.) The court further reasoned that, even if the officer's actions constituted a search, it was reasonable under the circumstances, and the extent of the intrusion was minimal. (App. A, ¶ 26.) Thus, the court held that the search was not prohibited under the Fourth Amendment. (App. A, ¶ 27.) The court further noted that it was not persuaded or bound by the Ninth Circuit's Opinion in *$277,000 U.S. Currency*. (App. A, ¶ 21.) The court further concluded that the lack of any federal constitutional violation disposed of any argument that the Arizona constitutional counterpart to the Fourth Amendment was violated. (App. A, ¶ 28.)

The Arizona Supreme Court denied review, and this timely Petition for Writ of Certiorari followed. (App. C.)

REASONS FOR GRANTING THE PETITION

The issue presented is one of first impression in the United States Supreme Court and involves a State's misinterpretation of federal constitutional law. Under the Fourth Amendment to the United States Constitution, the Arizona Court of Appeals incorrectly decided that a police officer's lifting of a car cover did not constitute a search violating Mr. Allen's reasonable expectation of privacy, and that, if it was a search, it was reasonable under the totality of the circumstances. This Court must correct Arizona's unconstitutional decision.

Moreover, the Arizona Court of Appeals has unreasonably extended this Court's holding in *Class* in order to allow police officers to engage in roving suspicionless searches of covered vehicles despite other applicable Supreme Court precedent leading to the conclusion that the search was unreasonable. And, while the issue presented is a nuance of Fourth Amendment law, it is of vast importance to citizens around the country. Where a citizen objectively manifests his subjective expectation of privacy by covering his vehicle and not operating it on a roadway, the police have no right to violate his privacy by removing the cover in order to search for evidence of a crime

where there is no probable cause to support such action.

Finally, the Arizona Court of Appeals has issued a Fourth Amendment Opinion explicitly conflicting with the Ninth Circuit Court of Appeals interpretation of the same factual scenario and expressly disregarding the Ninth Circuit's holding. Thus, this Court must also accept certiorari in order to correct and clarify the law once and for all and to ensure that all jurisdictions, be they federal or State, are properly protecting rights ensured pursuant to the Fourth Amendment to the United States Constitution.

A. Reasons to review the Arizona Court of Appeals' conclusion that Sgt. Butler's removal of the car cover did not constitute a search.

The Fourth Amendment protects against unreasonable searches and seizures and provides that search warrants should issue only upon probable cause. *Payton v. New York*, 445 U.S. 573, 582, 100 S.Ct. 1371, 1378 (1980); *State v. Dean*, 206 Ariz. 158, 161, 76 P.3d 429, 432 (2003).

> At the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home *or expectation of privacy* must be strictly circumscribed.

Payton, 445 U.S. at 582, fn. 17, 100 S.Ct. at 1378 (emphasis added); *Camara v. Municipal Ct.*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730 (1967). Warrantless searches are *per se* unreasonable under the Fourth Amendment unless justified by "a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1976); *Dean*, 206 Ariz. at 161, 76 P.3d at 432. Exceptions to the warrant requirement "must be narrowly tailored to the circumstances that justify their creation." *Florida v. Royer*, 460 U.S. 491, 499-500, 103 S.Ct. 1319, 1325 (1983); *Chimel v. California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040 (1969); *Terry v. Ohio*, 392 U.S. 1, 19, 25-26, 88 S.Ct. 1868, 1878-79, 1882 (1968); *State v. Kempton*, 166 Ariz. 392, 396, 803 P.2d 113, 117 (App. 1990).

Motor vehicles have occupied a special place in search and seizure law in that an exception to the warrant requirement has been established in regard to stopping and searching a vehicle. *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280 (1925). This warrant exception has developed because of the mobility inherent in a motor vehicle. It has not, however, stripped motor vehicles of Fourth Amendment protections. Motor vehicle or no motor vehicle, there must be probable cause for a search. *Almeida-Sanchez v. United States*, 413 U.S. 266, 269, 93 S.Ct. 2535, 2537-38 (1973).

A search occurs when there is an intrusion upon someone's legitimate expectation of privacy. *Illinois v.*

Andreas, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324 (1983); *State v. DeWitt*, 184 Ariz. 464, 467-68, 910 P.2d 9, 12-13 (1996). And, because the Fourth Amendment protects "people, not places," it safeguards people's subjective expectations of privacy that are objectively reasonable under the circumstances. *Katz*, 389 U.S. 347, 351-52, 361, 88 S.Ct. 507; *United States v. Ziegler*, 474 F.3d 1184, 1189 (9th Cir. 2007).

Here, Bryan Allen's privacy expectation in his car's outward appearance was objectively reasonable under the circumstances and falls easily within the Fourth Amendment's scope. *See Katz*, 389 U.S. at 351-52, 361, 88 S.Ct. 507; *$277,000 U.S. Currency*, 941 F.2d at 902. In a markedly similar Ninth Circuit case, the police, responding to a noise complaint, entered the yard of a property and observed two parked vehicles bearing Mexican license plates and covered with opaque car covers. *$277,000 U.S. Currency*, 941 F.2d at 889. One of the officers noted that vehicles are often stolen and sold in Mexico. *Id.* Based upon this minimal suspicion, an officer raised the car cover on each car to locate the VIN numbers, planning to cross check the numbers against stolen vehicle reports. *Id.*

The Ninth Circuit properly concluded under the circumstances, that an illegal search occurred when the officers removed the automobile's opaque cover searching for a VIN number on the suspected stolen vehicle without probable cause. *$277,000 U.S. Currency*, 941 F.2d at 902. The court found that, while

the owner of the vehicle in question had no legitimate expectation of privacy in the residence or backyard (because he did not own them), he did have a reasonable expectation of privacy in the covered car. *Id.* at 902. The court accordingly concluded that the officer's lifting the car cover was a search and, without probable cause, the officer's search violated the Fourth Amendment. *Id.* To hold otherwise, the court reasoned, would permit the police "to rove the streets, to remove car covers, or break into any automobiles where the VIN number is obscured in some way." *Id.*

The facts of Petitioner's case cannot be distinguished. His car was parked in his residential parking lot, and he covered his car, thus protecting it from viewing by the police or the public. By doing so, he clearly manifested his subjective expectation of privacy, and there can be no question that objectively that expectation of privacy was also clear and reasonable. *$277,000 U.S. Currency*, 941 F.2d at 902; *see Andreas*, 463 U.S. at 771, 103 S.Ct. at 3324. No reasonable person approaching a car covered in such a manner would assume he/she had any right to remove the cover in order to view the exterior of the automobile underneath. *See id.* Nor was the car being operated on the roadways, so there is no argument that it was necessarily exposed to public viewing of the contents or any of the exterior such as the license plate or VIN, all of which was covered by the car cover. *Id.*

Despite the Ninth Circuit case directly on point, the Arizona Court of Appeals relied instead on the

"open fields" doctrine discussed in *Oliver v. United States*, 466 U.S. 170, 182-83, 104 S.Ct. 1735 (1984), and the "reasonable expectation of privacy" discussion in *Class*, 475 U.S. at 114, 106 S.Ct. 960, as the basis to support a conclusion that Bryan Allen had no "reasonable expectation of privacy in the exterior of a vehicle." (App. A., ¶ 16.)

In its discussion, which also included the plurality decision in *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464 (1974), the Arizona court relied on the *general* ideas expressed in those prior cases concerning how "little capacity for escaping public scrutiny" a car has, because it "travels public thoroughfares where both its occupants and contents are in plain sight." (App. A., ¶ 16.) The Arizona court ignored the fact that, unlike the cases cited, here, Bryan Allen's car was not "thrust into the public eye." (App. A, ¶ 17.) Bryan Allen had his vehicle *covered* and secured in a residential parking lot, indicating that he was protecting it from the public view and clearly expressing his expectation of privacy in the material under that cover. *$277,000 U.S. Currency*, 941 F.2d at 902.

The fact that *if* Bryan Allen were to take the cover off himself and drive the vehicle on the roadways, he would be subjecting the exterior, including the VIN, to "plain sight" viewing which could lead to the conclusion that he had a lessened expectation of privacy in the exterior, has no bearing on the fact that *he was not exposing his vehicle* to any "plain sight" viewing, nor was he operating the vehicle on the

roadways in any manner that would expose it or its contents to plain view or even mandate the visibility of his VIN. *See Katz*, 389 U.S. at 351-52, 88 S.Ct. 507 (what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected); *accord Rios v. United States*, 364 U.S. 253, 261-62, 80 S.Ct. 1431, 1436-37 (1960); *Ex parte Jackson*, 96 U.S. 727, 733 (1877). There are no applicable Motor Vehicle laws that required or allowed public viewing of the exterior of that car, since it was not being utilized but was instead parked and covered at Bryan Allen's residence and theoretically could have remained there inoperable and not in compliance with any motor vehicle laws for an indeterminate amount of time. The private material under that car cover was not open for viewing by the public or the police. *See id.*; *Arizona v. Hicks*, 480 U.S. 321, 325, 107 S.Ct. 1149, 1152 (1987).

The general lessened expectation of privacy discussed by this Court in *Class* can only come into play when a person actually operates a motor vehicle on the roadways, and thereby necessarily foregoes his privacy in order to maintain his privilege to drive. 475 U.S. at 112, 106 S.Ct. at 965; *see Katz*, 389 U.S. at 351-52, 88 S.Ct. 507; *Rios*, 364 U.S. at 261-62, 80 S.Ct. at 1436-37; *Jackson*, 96 U.S. at 733. Again, the whole foundation of *Cardwell* and *Class* lies in the premise that normally, a "car has little capacity for escaping public scrutiny," because it travels "public thoroughfares" and the "contents are in plain view." *Class*, 475 U.S. at 112, 106 S.Ct. at 965; *Cardwell*,

417 U.S. at 591-92, 94 S.Ct. at 2470. But, Bryan Allen's *covered* car securely parked in a residential parking lot does not fall within that general premise. Unlike *Class*, Bryan Allen's car had the capacity to escape public scrutiny, because it was not being operated in any public area, and he affirmatively precluded any "plain view" of the exterior or interior by covering it. *See id.*; *Hicks*, 480 U.S. at 325, 107 S.Ct. at 1152.

Moreover, officer safety, an issue irrelevant here, was critical to this Court's holding in *Class*, given that officers there spotted a pistol beneath the driver's seat prior to conducting the search. *Class*, 475 U.S. at 116, 106 S.Ct. at 967 ("In light of the danger to the officers' safety that would have been presented by returning respondent immediately to his car, we think the search to obtain the VIN was not prohibited by the Fourth Amendment."). Dissimilarly, there is no exigency, emergency, or any arguable officer or public safety issue involved in this case.

The Arizona Court of Appeals recognized that its findings were inconsistent with *$277,000 U.S. Currency*, but held that it was not "persuaded" by that case, and that the Ninth Circuit failed to recognize the distinction between physically entering a car and simply viewing the exterior. (App. A, ¶ 21.) The Arizona court also noted that it is not bound by Ninth Circuit precedent. (App. A, ¶ 21, fn. 4.) Finally, the court distinguished this Court's decision in *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149 (1987), based on the difference between the residence searched in that

case and the "parking lot" search in this case. (App. A, ¶ 22.) The problem is not in the officer's entrance into the parking lot, however, but it is in the officer's removal of Bryan Allen's personal car cover from over his car. As in *Hicks*, the officer may have been justified to be in the area, so that anything in plain view was available for his perusal, but once the officer affirmatively *moved* personal property his actions became an unreasonable new "search." *Hicks*, 480 U.S. at 325, 107 S.Ct. at 1153. Sgt. Butler's legal presence in the parking lot, cannot validate his further actions of removing Bryan Allen's personal car cover in order to look underneath. *Id.*

In sum, *$277,000 U.S. Currency* and *Hicks* both support the proposition that Mr. Allen's asserted privacy expectations were objectively reasonable and within the Fourth Amendment's ambit. This Court's other precedent regarding the lack of a reasonable expectation of privacy in the exterior of vehicles does not compel a different conclusion, since those cases clearly contemplate that the vehicles under discussion were being actively operated on the roadways and were thus exposed to public scrutiny in a manner inapplicable to Bryan Allen's circumstances. Unlike those cases, here, the covering of the car in the residential parking lot clearly indicated that Bryan Allen had a legitimate expectation of privacy in the material under that car cover. Accordingly, the Court of Appeals constitutionally erred in misinterpreting and/or overextending this Court's precedent in *Cardwell* and *Class*, and in refusing to follow *Hicks*, and

Ninth Circuit precedent, by concluding that Sgt. Butler's peeling back the car cover did not constitute a search. This Court must grant the Petition for Writ of Certiorari in order to rectify this misinterpretation of constitutional law and to synthesize the conflicting opinions on the matter.

B. Reasons to review the Arizona Court of Appeals' conclusion that Sgt. Butler's removal of the car cover, if a search, was not unconstitutional.

The Arizona Court of Appeals further constitutionally erred by finding that, assuming Sgt. Butler's actions constituted a search, the search was reasonable under the totality of the circumstances. There is no question that, while people's privacy rights in automobiles are traditionally curtailed because automobiles are mobile and heavily regulated, officers warrantlessly searching them for crime evidence must still have probable cause to do so:

> Law enforcement officers are entitled to search an automobile without first obtaining a warrant in those cases where the police have probable cause to believe that an automobile contains evidence of a crime. This vehicle exception to the warrant requirement is founded on two basic principles. First, automobiles are mobile and can be moved quickly outside the jurisdiction of the magistrate from whom the warrant must be sought. Second, the expectation of privacy in one's vehicle is reduced by the pervasive

> regulations governing vehicles capable of traveling upon public roads.

United States v. Hatley, 15 F.3d 856, 858 (9th Cir. 1994) (internal citations and quotation marks omitted). As already discussed, the automobile exception's underlying rationale, regarding the regulations over vehicles traveling on roadways, do not apply where the vehicle is not traveling on a road way, is not in plain sight, and where there is no reason to suspect the covered vehicle was even capable of traveling on a roadway. Moreover, as this Court emphasized in *Almeida-Sanchez*, 413 U.S. at 269, 93 S.Ct. at 2537-38, the automobile exception to the warrant requirement (established in *Carroll*, 267 U.S. 132, 45 S.Ct. 280), did not "declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search." *Kempton*, 166 Ariz. at 396-97, 803 P.2d at 117-18 ("The exigencies which create the automobile exception are the lack of time to get a warrant and the mobility of the vehicle.").

Here, as the State conceded at the trial level, no probable cause supported Sgt. Butler's search. Moreover, as Sgt. Butler candidly stated, he did not even have a hunch that the car was involved in a crime and could cite only the fact that the car was covered as the basis for the search. The presence of the car cover alone hardly establishes probable cause, nor even a reasonable suspicion (which must be more than just a hunch) to support a search. *United States v. Johnson*, 256 F.3d 895, 905 (9th Cir. 2001) (citing

and quoting cases). Permitting searches on the presumption that covered cars contain or exhibit crime evidence would realize the impermissible scenario the Ninth Circuit warned against in *$277,000 U.S. Currency,* of police roving the streets and removing car covers to search vehicles.

The Arizona Court of Appeals, citing to *United States v. Knight*, 534 U.S. 112, 118, 122 S.Ct. 587 (2001), found that the search in this case was reasonable despite the lack of any probable cause to support the search. (App. A, ¶ 25.) This finding cannot be sustained. It was based on a review of the "governmental interests involved," which included "the legitimate function of investigating a fatal hit-and-run accident hours after its occurrence by checking for suspect vehicles in the surrounding area." (App. A., ¶ 25.) The court then weighed that government interest against the "minimal" intrusion upon Mr. Allen's rights, in order to come to its conclusion. (*Id.*) Constitutional law does not support this finding.

> [W]here a Fourth Amendment intrusion serves *special* governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 & n. 3, 109 S.Ct. 1384 (1989) (emphasis added). The police are almost always investigating

crimes, and very often those crimes are extremely serious and may involve a fatality, so that "normal" governmental interest cannot, on its own, justify what would otherwise be an unreasonable search. *See id.*; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S.Ct. 2022, 2031-2032 (1971); *Chambers*, 399 U.S. at 51, 90 S.Ct. at 1981; *Katz*, 389 U.S. at 357, 88 S.Ct. at 514. Here, there was no "special" government interest other than "normal" crime investigation, nor is there anything in the record to support a finding that it was impractical to require a warrant or particularized suspicion. Thus, the weighing of interests despite the admitted lack of probable cause should not have even occurred.

Moreover, the legitimate government interest in continuing a search for a suspect vehicle, even if sufficient to support a balancing against Bryan Allen's privacy interests, must still be focused, meaning the officer needed to have, at a minimum, a reasonable (individualized and particularized) suspicion for his search of Bryan Allen's vehicle. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S.Ct. 447 (2000); *United States v. Aukai*, 497 F.3d 955, 958 (9th Cir. 2007); *United States v. Baker*, 221 F.3d 438, 445 (3d Cir. 2000). Otherwise, a "normal" need for law enforcement and investigation of crimes would routinely allow searching of any person or place at any time without a warrant or probable cause, and such is not the law. *See Aukai*, 497 F.3d at 959. Instead, the law mandates that the suspicion be reasonable regarding the specific person or place searched. *Edmond*, 531

U.S. at 37, 121 S.Ct. 447; *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412 (1990); *United States v. Williams*, 417 F.3d 373, 376 (3d Cir. 2005). In this case, Sgt. Butler had no probable cause nor even a reasonable suspicion regarding the car under that car cover when he lifted the car cover. Instead, the officer admitted he did not even have a hunch. The Arizona Court of Appeals has determined that the generic government interest in searching an area for a suspect vehicle was sufficient to support a warrantless search, and this holding clearly violates the express dictates of Fourth Amendment law.

Moreover, in making its balancing determination under *Knight*, the Arizona court ignored the critical distinction that *Knight* involved a probationer, who had a lesser expectation of privacy, and the government, a heightened interest due to his status. 534 U.S. at 119, 122 S.Ct. at 591. That scenario is not applicable in this case. Unlike Knight, Bryan Allen maintains his "absolute liberty" and privacy "to which every citizen is entitled." *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593 (1972). Here, unlike *any* parole or probation cases, the legitimate government interest of investigating a possible crime, cannot "outweigh the privacy interests of a private citizen who has no knowledge that [ ]he is subject to search at any time and who has never signed a waiver giving up h[is] Fourth Amendment rights." *State v. Montgomery*, 174 P.3d 936, *5 (Kan. App. 2008). Under the circumstances, a general investigation of a suspected crime cannot outweigh a specific

legitimate expectation of privacy, especially when there is no particularized suspicion supporting a search.

Moreover, as already discussed, traditional rationales for reducing automobile privacy expectations are inapplicable here. The lifting of the car cover did in fact intrude into Bryan Allen's reasonable expectation of privacy. The automobile was not in plain view, nor was it being operated on a public road. Instead, the car was parked and covered in a residential parking lot, so there was no threat of immediate flight. Sgt. Butler had ample time to secure a warrant and simply failed to do so. There is nothing to suggest that obtaining a warrant under these circumstances would have been impracticable. Sgt. Butler's search was not reasonable under such circumstances.

Indeed, the Ninth Circuit distinguished *Class* in *$277,000 U.S. Currency*, on a similar basis:

> In the case at hand, the vehicles were not being driven on the roads; they were parked in a backyard. The occasion for the inspection was not brought about by traffic violations; it was merely the discovery of two vehicles with Mexican license plates parked in the backyard. The factors carefully balanced in the *Class* opinion, such as the necessity of vehicle regulation on the public highways, officer safety and the minimal intrusion involved by removing a paper from the dashboard of a vehicle already stopped for

> traffic violations, are simply inapplicable here. Surely the careful balancing revealed in the *Class* opinion is not to be extended so as to permit a search of any parked vehicle without probable cause just because the VIN is obscured in some way.

$277,000 U.S. Currency, 941 F.2d at 902.

Again, warrantless searches are *per se* unreasonable under the Fourth Amendment unless justified by "a few specifically established and well-delineated exceptions," none of which are applicable here. *Katz*, 389 U.S. at 357, 88 S.Ct. 507; *Dean*, 206 Ariz. at 161, 76 P.3d at 432; *see Florida*, 460 U.S. at 499-500, 103 S.Ct. at 1325; *Chimel*, 395 U.S. at 762-63, 89 S.Ct. at 2040; *Terry*, 392 U.S. at 19, 25-26, 88 S.Ct. 1868, 1878-79. The Arizona Court of Appeals, refusing to follow *$277,000 U.S. Currency*, the Fourth Amendment to the United States Constitution, and this Court's precedent, has issued an Opinion finding to the contrary. This Court must grant the Petition for Writ of Certiorari in order to correct the Arizona court's decision, which is published and which will have a lasting injurious effect on citizens of this country whose vehicles are targeted for random suspicionless searches. This Court must clarify the law and alert the lower courts to the impropriety of such unconstitutional actions.

As this Court warned in *Silverman v. United States*:

> What the Court said long ago bears repeating now: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

365 U.S. 505, 512, 81 S.Ct. 679, 683 (1961); (quoting *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 535 (1886)). This Court should not allow this deviation from the proper mode of procedure to stand. The Fourth Amendment privacy rights of all citizens are at issue and must remain inviolate.

CONCLUSION

Based upon the forgoing, Petitioner respectfully requests this Court to grant his Petition for Writ of Certiorari. The Arizona Court of Appeals' published Opinion cannot stand as it conflicts with other published federal opinions, misinterprets this Court's holding in *Class*, and unconstitutionally concludes that an officer's lifting of a car cover to search for evidence of a crime is reasonable under the constitution despite the lack of a warrant or even probable cause to support the search. The type of roving suspicionless searching of cars that this opinion will allow cannot be sustained, and Petitioner asks this Court to

grant review and reverse based on the State of Arizona's violation of his constitutionally protected right to be free from unreasonable searches and seizures.

Respectfully submitted,

DAVID MICHAEL CANTOR, *Counsel of Record*
CARI MICHELE MCCONEGHY-HARRIS
TODD E. NOLAN
THE LAW OFFICES OF DAVID MICHAEL CANTOR, P.C.
2141 East Broadway Road, Suite 220
Tempe, Arizona 85282-1705
(480) 858-0808

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellant, v. BRYAN ALLEN, Appellee.	)	1 CA-CR 06-0689 DEPARTMENT D **OPINION** (Filed Aug. 23, 2007)

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-134626-001 DT

The Honorable Michael D. Gordon, Judge

REVERSED

Andrew P. Thomas, Maricopa County Attorney — Phoenix
By Diane Gunnels Rowley, Deputy County Attorney
Attorneys for Appellant

Law Office of David Michael Cantor, PC — Tempe
By Todd E. Nolan
James C. Harberson III
Attorneys for Appellee

HALL, Judge.

¶1 As part of the investigation of a fatal hit and run car-pedestrian accident, a police officer checked

surrounding neighborhoods looking for the vehicle that fled the scene. Driving through an apartment complex, the officer noticed a vehicle partially draped with a cloth car cover that may have met the description of the car for which he was looking. He then lifted the cover and discovered damage to the front and passenger side of the vehicle. Bryan Allen, the owner of the vehicle, was subsequently charged with leaving the scene of an accident. Allen moved to suppress the evidence of damage to his vehicle and incriminating statements he made to the police as fruit of an illegal search. The trial court granted the motion. For reasons that follow, we reverse.

FACTS AND PROCEDURAL HISTORY

¶2 In reviewing a trial court's decision on a motion to suppress, we view the facts in the light most favorable to upholding the trial court's ruling and consider only the evidence presented at the suppression hearing. *State v. Wyman,* 197 Ariz. 10, 12, ¶ 2, 3 P.3d 392, 394 (App. 2000).

¶3 Shortly after midnight on October 22, 2005, Daniel S. was stopped at a red light at the intersection of Apache Boulevard and McClintock Drive in Tempe. While waiting for the light to change, he observed a red sports car approaching northbound on McClintock at a speed he estimated at eighty miles per hour. When the car reached the crest of the intersection, it became airborne for a short distance, struck the pavement, bounced into the air again, and

continued northbound on McClintock. As the car left his view, Daniel S. heard a thud from the direction in which the car was heading and saw something fly through the air.

¶4 After the traffic light changed, Daniel S. drove to the area where the thud occurred. Approximately 200 feet north of the intersection, he discovered a body on the sidewalk and called 911. When Tempe Police Sergeant John Butler arrived on the scene, Daniel S. informed the officer what he saw and identified the vehicle as a red Mitsubishi 3000 GT two-door sport coupe.[1] The officer also observed substantial debris in the roadway, including "small red parts of an automobile."

¶5 Sergeant Butler remained at the scene until he was relieved by the vehicular crime sergeant at around 3:30 a.m. He thereafter "took it upon [him]self" to check the surrounding neighborhoods for the car involved in the collision. During his search, Sergeant Butler drove through various apartment complexes in the area looking for red sports cars. He knew from the debris and blood at the scene that the damage to the vehicle involved in the collision would be significant. There were numerous red vehicles in the area, and the officer sometimes stopped to look at particular ones.

---

[1] The witness explained that he was able to provide a specific identification of the vehicle make and model because he previously worked at an automotive body shop.

¶6 Sergeant Butler eventually came to an apartment complex on East Hayden Lane that has an open lighted parking lot that wraps around the outside of the apartment building. As he entered the lot, Sergeant Butler observed two red cars parked side by side in an area of the lot with covered parking. The second of the two cars was partially covered with an elastic-banded gray opaque tarp. The car cover left the bottom twelve to fifteen inches of the vehicle exposed, and Sergeant Butler observed that the vehicle was a red two-door sport coupe.

¶7 Although Sergeant Butler could not observe damage to the car with the cover in place, there were things that made him suspicious of the vehicle. In addition to being the only car in the lot with a car cover, he noted that the seat belt was hanging out on the passenger side with the door closed on it. Sergeant Butler peeled back a portion of the cover at the front of the vehicle and saw extensive damage to the right headlamp assembly. Raising the cover further on the passenger side, he observed additional damage to the front passenger side window and roof. He then lifted the cover at the back of the car to obtain the license plate number. Based on the plate number, Sergeant Butler was able to identify Allen as the owner of the vehicle and contact him regarding the collision.

¶8 Allen was subsequently indicted for leaving the scene of an accident involving death. Before trial, Allen moved to suppress the evidence of the damage to his car and statements he made to the police,

claiming they were obtained as a result of an unlawful search in violation of his rights under the Fourth Amendment to the United States Constitution and Article 2, Sections 4 and 8, of the Arizona Constitution. Following an evidentiary hearing, the trial court granted the motion. At the request of the State, the trial court dismissed the charge against Allen without prejudice. The State then commenced this appeal. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 (2001) and 13-4032(6) (2001).

DISCUSSION

¶9 The Fourth Amendment of the United States Constitution and Article 2, Section 8, of the Arizona Constitution protect against unreasonable searches and seizures. When a violation of the Fourth Amendment or its state counterpart is determined to have occurred, the exclusionary rule generally requires the suppression at trial of any evidence directly or indirectly gained as a result of the violation. *State v. Schinzel,* 202 Ariz. 375, 382, ¶ 28, 45 P.3d 1224, 1231 (App. 2002).

¶10 In challenging the evidence obtained as a result of Sergeant Butler's lifting the car cover to inspect his vehicle, Allen argued, and the trial court agreed, that the evidence of the damage to the vehicle and his subsequent statements to the police must be suppressed because the officer conducted an unlawful

search. Specifically, the trial court found that Allen met his burden of proving both a subjectively and an objectively reasonable expectation of privacy when he covered his car and that the officer's actions in lifting the car cover without probable cause[2] constituted an illegal search in violation of both the United States and Arizona Constitutions.

¶11 The State contends that the trial court erred in granting the motion to suppress because the lifting of the car cover did not constitute a "search" because Allen had no reasonable expectation of privacy in the exterior of his vehicle. In the alternative, the State invites us to hold that even if the lifting of the car cover was a "search," any intrusion was de minimis and outweighed by the importance of the governmental interest justifying the intrusion, rendering it constitutionally permissible. We review a ruling on the motion to suppress for an abuse of discretion if it involves a discretionary issue, but review constitutional and purely legal issues de novo. *State v. Booker,* 212 Ariz. 502, 504, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶12 The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

---

[2] The State did not argue that the officer had probable cause. Instead, the State contended that the officer's actions did not constitute a search and, even if it was a search, it fell within the exigent circumstances exception.

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things seized." Its corollary in the Arizona Constitution, Article 2, Section 8, states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

¶13 A "search" under the Fourth Amendment occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen,* 466 U.S. 109, 113 (1984). The protection provided by the Fourth Amendment encompasses private information rather than formal definitions of property. *Katz v. United States,* 389 U.S. 347, 353 (1967). To have a *legitimate* expectation of privacy protected by the Fourth Amendment, a person must show both an "actual (subjective) expectation of privacy" and that the expectation is one that society is prepared to recognize as "justifiable" under the circumstances. *Smith v. Maryland,* 442 U.S. 735, 7400 (1979) (quoting *Katz,* 389 U.S. at 353); *see also California v. Greenwood,* 486 U.S. 35, 39 (1988) (holding Fourth Amendment protects only a "subjective expectation of privacy . . . that society accepts as objectively reasonable"). Thus, if the actions by Sergeant Butler did not intrude upon Allen's legitimate expectation of privacy, there was no "search" subject to the Warrant Clause. *See Illinois v. Andreas,* 463 U.S. 765, 771 (1983).

¶14 Although there was no testimony presented at the evidentiary hearing regarding how Allen's car

came to be covered, we assume that Allen placed the car cover over the vehicle for the purpose of hiding the damage that resulted from the collision. Accordingly, there was no abuse of discretion by the trial court in finding that Allen had a subjective expectation of privacy in the portion of the vehicle that he covered.

¶15 However, the fact that Allen sought to hide the damage to his vehicle by using a car cover does not determine whether he had an objectively legitimate expectation of privacy in the exterior appearance of his car. "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but instead "whether the government[al] intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver v. United States,* 466 U.S. 170, 182-83 (1984); *see also New York v. Class,* 475 U.S. 106, 114 (1986) ("We have recently emphasized that efforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist."). Whether a particular expectation of privacy is recognized by society as objectively reasonable is a matter of constitutional law that we consider de novo. *State v. Adams,* 197 Ariz. 569, 572, ¶ 16, 5 P.3d 903, 906 (App. 2000).

¶16 The United States Supreme Court has never held that there is a reasonable expectation of privacy in the exterior of a vehicle. To the contrary, in *Cardwell v. Lewis,* 417 U.S. 583 (1974), a plurality of the Court, after noting that "insofar as Fourth Amendment

protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry[,]" *id.* at 591, held that "the examination of [a] tire . . . and the taking of paint scrapings from the exterior of [a] vehicle" do not implicate any cognizable Fourth Amendment privacy interest. *Id.* The plurality reasoned that no reasonable expectation existed in the exterior of an automobile because an automobile "seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and contents are in plain sight." *Id.* at 590. In concluding that no Fourth Amendment violation occurred, the plurality stated:

> In the present case, nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence. With the "search" limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed. Stated simply, the invasion of privacy, "if it can be said to exist, is abstract and theoretical."

Id. at 591-92 (citation and footnotes omitted).

¶17 Twelve years later, in *New York v. Class,* a majority of the Court expressly endorsed the *Cardwell* plurality's conclusion that an examination of the

exterior of a vehicle "does not constitute a [Fourth Amendment] 'search'" because the exterior of a vehicle "is thrust into the public eye." 475 U.S. at 114. In explaining that a motorist stopped for traffic violations does not have a constitutionally protected privacy interest in a VIN located in the interior of the vehicle on the dashboard but obscured from view by papers, the Court observed that the "VIN's mandated visibility makes it more similar to the exterior of the car than to the trunk or glove compartment." *Id.* Thus, the court concluded, it was only when an officer actually reached into the interior of the vehicle to move papers that obstructed the VIN that a search under the Fourth Amendment occurred. *Id.* at 114-15. The Court went on to find that the search was not "unreasonable" under the Fourth Amendment because it was "no more intrusive than necessary" to fulfill the lawful objective of viewing the VIN. *Id.* at 118-19.

¶18 In the present case, Allen's car was parked in a location accessible to the public. No claim is made that Sergeant Butler did not have the right or authority to be in the parking lot or that his presence there, by itself, invaded or otherwise infringed on Allen's right of privacy. The record does not reveal that the car cover was locked in place; to the contrary, from the description in the record, the cover was of the sort that easily could be raised (or removed) by a passerby. In lifting the car cover, the only thing that the officer exposed to his view was the exterior of the vehicle. No entry was made into the vehicle, nothing

was taken from the vehicle, and no damage was done to the vehicle. The officer merely viewed its exterior. Under these circumstances, the lifting of the car cover did not infringe upon any reasonable expectation of privacy that Allen had with respect to his vehicle.[3] *See State v. Ball,* 530 A.2d 833, 835 (N.J. Super. App. Div. 1987) (holding removal of blanket covering hoodless pickup truck's engine not a search within the meaning of Fourth Amendment).

¶19 In arguing that he had a reasonable expectation of privacy in the exterior of his vehicle, Allen relies primarily on *United States v. $277,000 United States Currency,* 941 F.2d 898 (9th Cir. 1991). This decision was also cited by the trial court as the basis of its ruling granting the motion to suppress. In *$277,000 United States Currency,* the Ninth Circuit held that the police performed a search by removing a tarp covering a truck parked in the backyard of a residence. The police were in the backyard of the home investigating a complaint of loud music. *Id.* at 899. After being admitted to the backyard, one of the officers proceeded to lift tarps that covered two parked vehicles to check the VIN on each vehicle. *Id.* The officer had noted Mexican license plates on the vehicles and he was aware that sometimes stolen American cars were sold in Mexico. *Id.* Based on that

---

[3] Even though the touching of the cover could be considered a technical trespass at common law, a property interest does not in itself determine the legitimacy of privacy rights protected under the Fourth Amendment. *Oliver,* 466 U.S. at 183.

rationale alone, the officer decided to check the VIN. When he could not find a VIN from the exterior of one of the vehicles, he opened the locked vehicle in order to locate the VIN and discovered a large amount of cash, which became the subject of the forfeiture action. *Id.* at 899-900.

¶20 In suppressing the evidence found in the truck, the Ninth Circuit held that the owner of the truck in question had no legitimate expectation of privacy in the backyard because he was not the owner of the residence, but did have a reasonable expectation of privacy in the truck. *Id.* at 901. Therefore, the police were not justified in removing the cover from the truck or entering the vehicle to inspect for the VIN, and doing so constituted a search in violation of the Fourth Amendment. *Id.*

¶21 We are not persuaded that the Ninth Circuit's decision in *$277,000 United States Currency* compels the conclusion that the lifting of a car cover necessarily constitutes a "search" for purposes of the Fourth Amendment.[4] The government did not argue in *$277,000 United States Currency* that the officer's action in looking under the cover did not constitute a

---

[4] Arizona state courts are not bound by the Ninth Circuit's interpretation of federal constitutional protections. *See, e.g., State v. Montano,* 206 Ariz. 296, 297, 77 P.3d 1246, 1247 (2003) (declining to follow a Ninth Circuit decision that a trial judge's imposition of the death penalty in violation of *Ring v. Arizona,* 536 U.S. 584 (2002), could not be subject to harmless error analysis).

search, and the Ninth Circuit simply concluded that it was without any analysis or citation to authority. *Id.* Furthermore, in finding that the officer's conduct could not be justified, the court implied that the lifting of a car cover was the equivalent of breaking into the interior of a vehicle. *Id.* at 902. In making this analogy, the court did not consider the distinction recognized in the law between viewing the exterior of a vehicle and physically entering the vehicle.

¶22 We also note that *Arizona v. Hicks,* 480 U.S. 321 (1987), is distinguishable. In *Hicks,* the Court held that an officer's movement of stereo equipment to view serial numbers constituted a search. *Id.* at 325. In that case, however, officers entered an apartment based on the "exigent circumstance" of the discharge of a weapon within the apartment. Consequently, a search was clearly involved because the officers intruded into an area in which the defendant had a reasonable expectation of privacy. By further moving the stereo equipment, the officers expanded the warrantless search beyond the scope justified by the exigent circumstances on which their initial entry was based. *Id.*

¶23 In contrast, Sergeant Butler's presence in the apartment parking lot did not constitute a search as it was not an area in which Allen had any right to privacy. *See United States v. Cruz Pagan,* 537 F.2d 554, 558 (1st Cir. 1976) (holding no reasonable expectation of privacy in well-traveled common area such as garage of multi-unit apartment house). The lifting of the car cover to view the exterior of the vehicle

likewise did not invade any reasonable expectation of privacy. *See Ball, supra; see also Oliver,* 466 U.S. at 183 n.13 ("Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity whenever persons with criminal intent choose to erect barriers[.]"). Accordingly, we hold that the trial court erred in ruling that the action by the officer in lifting the car cover constituted an unlawful search under the Fourth Amendment.

¶24 Even if we were to assume that Sergeant Butler's actions amounted to a search, the Fourth Amendment only proscribes searches that are "unreasonable." "The touchstone of the Fourth Amendment is reasonableness." *United States v. Knights,* 534 U.S. 112, 118 (2001). Thus, even though the Fourth Amendment demonstrates a "strong preference for searches conducted pursuant to a warrant" backed by probable cause, *Illinois v. Gates,* 462 U.S. 213, 236 (1983), the Supreme Court has applied a reasonableness standard in reviewing warrantless searches or seizures in a variety of circumstances.[5]

---

[5] *See, e.g., Samson v. California,* 126 S.Ct. 2193 (2006) (parolee search); *United States v. Knights,* 534 U.S. 112 (2001) (probation search); *Maryland v. Wilson,* 519 U.S. 408 (1997) (seizure of car passenger); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989) (drug-testing programs); *United States v. Montoya de Hernandez,* 473 U.S. 531 (1985) (border searches); *New Jersey v. T.L.O.,* 469 U.S. 325 (1985) (school searches); *South Dakota v. Opperman,* 428 U.S. 364 (1976) (inventory searches); *Chimel v. California,* 395 U.S. 752 (1969) (searches incident to arrest); *Terry v. Ohio,* 392 U.S. 1

(Continued on following page)

See United States v. $109,179 in United States Currency, 228 F.3d 1080, 1087 (9th Cir. 2000) (observing that "even if the challenged action triggers the protections of the Fourth Amendment, a minimally intrusive action may be reasonable in view of the government interests it serves") (internal quotations omitted).

¶25 In determining whether a search was reasonable, we examine the totality of the circumstances and balance the degree to which the search intrudes upon an individual's privacy against the degree to which it is needed for the promotion of legitimate governmental interests. *Knights,* 534 U.S. at 118-19. In applying these considerations here, Allen had a very limited privacy interest, if any, in shielding the exterior appearance of his car from public view. From the perspective of the governmental interests involved, Sergeant Butler was engaged in the legitimate function of investigating a fatal hit-and-run accident hours after its occurrence by checking for suspect vehicles in the surrounding area. As he entered the apartment complex parking lot, he knew he was looking for a red Mitsubishi 3000 GT two-door sport coupe that had sustained substantial damage from colliding with the victim. He observed a red two-door sport coupe that was partially draped with a cloth car cover. By lifting a portion of the car cover, he

---

(1968) (stop and frisk); *Camara v. Municipal Court,* 387 U.S. 523 (1967) (administrative searches).

was able to observe extensive damage to the right front side of the vehicle. He also lifted the back portion of the car cover to obtain a license plate number, which enabled him to identify Allen as the owner and obtain his address.

¶26 Under these circumstances, Sergeant Butler's actions were reasonable under the Fourth Amendment. Unlike *$277,000 United States Currency,* in which officers responding to a noise complaint acted on a hunch in searching the vehicles in the backyard of a residence, Sergeant Butler was investigating a serious crime shortly after its occurrence and possessed at least some level of individualized suspicion that Allen's car might be the hit-and-run vehicle. *See Petersen v. City of Mesa,* 207 Ariz. 35, 38, ¶ 10, 83 P.3d 35, 38 (2004) ("To be reasonable, a search generally must be based upon some level of individualized suspicion of wrongdoing.").

¶27 In summary, the officer's lifting of the cover was a minimal intrusion that did not seriously infringe on any objectively reasonable privacy interest that Allen had in the exterior appearance of his car. *See $109,179 in United States Currency,* 228 F.3d at 1088 (concluding that insertion of key into a car door lock for the purpose of ascertaining whether car belonged to claimant "was not an unreasonable search prohibited by the Fourth Amendment"); *cf. Class,* 475 U.S. at 119 (holding that entry into vehicle to locate the VIN, although a search, was "sufficiently unintrusive to be constitutionally permissible").

¶28 In addition to finding a Fourth Amendment violation, the trial court ruled that the officer's actions in lifting the car cover violated the privacy protections provided by the Arizona Constitution. Our supreme court has held that Article 2, Section 8, of the Arizona Constitution provides greater privacy rights for a person's home than the Fourth Amendment. *See, e.g., State v. Bolt,* 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) (holding that police officers' warrantless entry of defendant's home in the absence of exigent circumstances to "secure" the residence until a search warrant could be obtained violated Article 2, Section 8). This holding, however, has not been extended to provide greater protections to a person's automobile. *State v. Reyna,* 205 Ariz. 374, 377 n.5, 71 P.3d 366, 369 n.5 (App. 2003). Given our conclusion that Sergeant Butler's lifting of the car cover was not a "search" under the Fourth Amendment or that, if it was a search, it was not an "unreasonable" search, the lifting of the car cover likewise did not violate any privacy rights under Article 2, Section 8, of the Arizona Constitution.

CONCLUSION

¶29 Sergeant Butler did not perform a "search" by violating a constitutionally protected reasonable expectation of privacy when he lifted the car cover and viewed the exterior of Allen's car that was parked in an area to which the public had access. Even if the officer's actions constituted a search, he nonetheless acted reasonably under the circumstances and the

extent of his intrusion into any legitimate right of privacy possessed by Allen was minimal. Therefore, the search was not prohibited under the Fourth Amendment as "unreasonable." Accordingly, we reverse the trial court's order of suppression.

/s/ Philip Hall
PHILIP HALL, Judge

CONCURRING:

/s/ Diane M. Johnsen
DIANE M. JOHNSEN, Presiding Judge

/s/ Lawrence F. Winthrop
LAWRENCE F. WINTHROP, Judge

APPENDIX B

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2005-134626-001 DT 07/27/2006

HONORABLE MICHAEL D. GORDON — CLERK OF THE COURT N. Hannahoe Deputy

STATE OF ARIZONA — RENE MCGREGOR

v.

BRYAN ALLEN (001) — TODD E. NOLAN

VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

(Filed Aug. 9, 2006)

Pending before the Court is defendant's Motion to Suppress Evidence. The Court held an Evidentiary Hearing on 07/14/2006 and ordered supplemental briefing by 07/21/2006. The Court granted the Motion. This written order follows.

The question before the Court is whether the State violated defendant's Fourth Amendment Rights and Rights under Articles 2 §§ 4 & 8 of the Arizona Constitution after a law enforcement officer lifted a car tarp, covering a parked automobile in an apartment complex. The officer was searching for a red automobile involved in a collision hereby [sic]. The State concedes that there was no probable cause but argues that the defendant did not have a subjective privacy interest that was otherwise objectively

reasonable. Thus, according to the State, there was no State or Federal constitutional violation.

Alternatively, the State argues that the "exigent circumstances" justified the search. The State raised this issue, for the first time, at the hearing.

THE COURT FINDS that the defendant met his burden of proving that he subjectively demonstrated an objectively reasonable expectation of privacy when he covered his car with the dark tarp.

THE COURT FURTHER FINDS that the law enforcement officer's decision to lift the car cover without probable cause constituted an unlawful search under Federal Constitutional law. *See, e.g. United States v. $277,000 U.S. Currency,* 941 F. 2d 898 (9th Cir. 1991).

THE COURT FURTHER FINDS that the Arizona Constitution provides protections at least as great as the Federal Constitution and, therefore, there is an independent Arizona constitutional violation.

THE COURT FURTHER FINDS that the "exigent circumstance" exception does not apply. This exception requires probable cause before it may justify the search. *State v. Fisher,* 141 Ariz. 227, 240, 686 P. 2d 750, 764 (1984). Even if the State were to argue that probable cause existed, and it does not, the record does not support such a finding. See also *State v. Million,* 27 Ariz. App. 490, 556 P. 2d 38 (1976).

Although the State did not raise the issue, the record does not support the "emergency aid" exception to the warrant. See *Fisher,* 141 Ariz. at 237-38, 760-61. This is because there is an insufficient factual basis to find that the police had reasonable grounds to believe there was an emergency at hand necessary to lift the tarp on that vehicle. *Id.* There was no evidence that anyone in the vehicle was injured and in need of aid. Indeed, at the time the Officer lifted the tarp, there was scant evidence that the subject vehicle was involved in an accident. It was nothing short of a hunch.

THE COURT FINDS that the search was primarily motivated by the intent to arrest and seize evidence based on a general search, and hunches underling that search.

IT IS ORDERED granting defendant's Motion to Suppress.

It is ordered permanently releasing Exhibits 1 through 9 to counsel for the State.

ISSUED: Exhibit Release Form.

/s/
JUDICIAL OFFICER OF THE
SUPERIOR COURT

APPENDIX C

[SEAL]

Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

RACHELLE M. RESNICK
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

February 12, 2008

RE: STATE OF ARIZONA v BRYAN ALLEN
Arizona Supreme Court No. CR-07-0297-PR
Court of Appeals Division One No.
1 CA-CR 06-0689
Maricopa County Superior Court No.
CR2005-134626-001 DT

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 12, 2008, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 12th day of February, 2008.

Rachelle M Resnick, Clerk

TO:
Randall M Howe, Chief Counsel, Criminal Appeals Section, Arizona Attorney General's Office
Diane Gunnels Rowley, Maricopa County Attorney's Office, Appeals and Westside Juvenile Division
Todd E Nolan, Law Office of David Michael Cantor PC
West Publishing Company
Lexis Nexis
Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix
kg